SUPREME COURT OF QUEENSLAND

CITATION:	*Wirkus & Anor v Wilson Lawyers* [2012] QCA 261
PARTIES:	**MICHELLE WIRKUS** (first appellant) **RANDOLF WIRKUS** (second appellant) **v** **WILSON LAWYERS** (respondent)
FILE NO/S:	Appeal No 4802 of 2012 SC No 7974 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	13 September 2012
JUDGES:	Fraser JA, Philip McMurdo and McMeekin JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be dismissed.** **2. The appellants pay the respondent the costs of the appeal.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – CONSENTS APPROVALS PERMITS AND AGREEMENTS – CONDITIONS – GENERALLY – where an approval for subdivision was granted subject to conditions including that an easement be granted over lot 1 – where easement was granted but was never registered – where the appellants claim that respondent should have advised them to enforce approval conditions prior to settling the dispute – where the primary judge held that there was no obligation to comply with the easement conditions and summary judgment was therefore given for the respondent – where the appellants claim that the 1987 approval was a 'continuing approval' under a 'former planning scheme' under the *Integrated Planning Act* 1997 (Qld) and the approval conditions therefore became binding on the body corporate when that Act came into effect – whether the 1987 approval was a 'continuing approval' under

s 6.1.24(1) of the *Integrated Planning Act* 1997 (Qld) – whether the approval was 'in force' immediately before s 6.1.23 of the *Integrated Planning Act* 1997 (Qld) came into effect

Acts Interpretation Act 1954 (Qld), s 32A
Building Units and Groups Titles Act 1980 (Qld), s 9, s 24
City of Brisbane Town Plan Modification Act 1976 (Qld)
Integrated Planning Act 1997 (Qld), s 6.1.1, s 4.3.3, s 4.3.22, s 6.1.23, s 6.1.24
Local Government (Planning and Environment) Act 1990 (Qld), s 5.1, s 8.10
Property Law Act 1974 (Qld), s 180

Conde v Gilfoyle [2010] QCA 109, cited
Suffolk County Council v Mason [1979] AC 705, cited
Thomas v Marshall [1953] AC 543; [1953] UKHL 2, cited
Wirkus & Anor v Wilson Lawyers [2012] QSC 150, cited

Bennion FAR *Bennion on Statutory Interpretation* 5th ed LexisNexis, London, 2008

COUNSEL: T W Quinn with T C Somers for the appellants
M D Hinson SC, with R P S Jackson, for the respondent

SOLICITORS: Kathleen Dare & Associates for the appellants
Bartley Cohen Lawyers for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Philip McMurdo J and the orders proposed by his Honour.

[2] **PHILIP McMURDO J:** In 2004, the appellant Mrs Wirkus purchased land at Goldieslie Road, Indooroopilly. She subdivided it into two parcels which she sold in late 2008. It is said to have been beneficially owned also by the other appellant, Mr Wirkus.

[3] Next door to their land, which I will call lot 1, was a group of houses which was the subject of a community title scheme known as Goldieslie Park. Not long after their purchase of lot 1, the appellants became involved in a dispute with the body corporate of that scheme about access to their respective properties from Goldieslie Road. The body corporate sued Mrs Wirkus and the appellants cross-claimed, seeking the imposition of a right of way in favour of lot 1 over the common property of Goldieslie Park, pursuant to s 180 of the *Property Law Act* 1974 (Qld). Those proceedings were settled in March 2007. The body corporate agreed to grant an easement over its land in favour of lot 1. That easement was registered and facilitated the subdivision of lot 1 into those two parcels.

[4] The respondent is a firm of solicitors who were retained to advise the appellants about their dispute with the body corporate and who represented them in those proceedings. The appellants' essential complaint is that the respondent failed to discover relevant facts about the approval for the development which became Goldieslie Park and which, the appellants contend, had bound the body corporate to grant an easement in favour of lot 1. The appellants say that this easement was

more favourable to the owner of lot 1 than that for which they settled in March 2007 and that had they known of it, they would not have settled as they did but would have enforced the body corporate's obligation and been better off.

[5] They commenced the present proceedings against the respondent in 2008, claiming damages for breach of contract or negligence. In May 2012, Peter Lyons J gave summary judgment for the respondent. He held that the body corporate had never been bound to grant an easement in favour of lot 1. This was a question of law, the relevant facts not being in dispute. As the alleged obligation of the body corporate was an essential element of the appellants' pleaded case, they had no real prospect of succeeding on their claim and there was no need for a trial.

[6] The appellants argue that this legal question was wrongly decided by his Honour. The respondent says that it was correctly decided for the reasons given and that there were other reasons for reaching the same conclusion. Then in the course of the hearing of this appeal, counsel for the appellants suggested another formulation of the plaintiffs' claim, which had not been pleaded or argued previously, for which an obligation on the body corporate to grant an easement would not be an essential element. To consider each of these arguments, it is necessary to discuss the relevant events in the development of Goldieslie Park and their statutory context.

The approval for Goldieslie Park

[7] In 1987, an application was made to the Brisbane City Council on behalf of the owner of lot 2 to subdivide that land under the then *Building Units and Group Titles Act* 1980 (Qld). The approval of the Brisbane City Council, as the relevant local authority, was required to be obtained prior to the lodging for registration of the plan of subdivision. More particularly, s 9(7) of that Act provided as follows:

> "(7) Every plan lodged for registration shall be endorsed with or be accompanied by a certificate of the local authority sealed with the common seal of the local authority that the proposed subdivision of the parcel as illustrated in the plan has been approved by the local authority and that all the requirements of the *Local Government Act* 1936-1979 as modified by this Act have been complied with in regard to the subdivision."

[8] The local authority was empowered to approve such a subdivision by s 24 of that Act which relevantly provided as follows:

> "…
>
> (4) In respect of an application for a certificate for the purposes of section 9(7) the local authority shall, subject to subsection (5) direct the issue of the certificate if it is satisfied that -
>
> (a) …
>
> (b) separate occupation of the proposed lots will not contravene -
>
> (i) the provisions of -
>
> (A) the town planning scheme; or
>
> (B) a by-law made pursuant to section 33(21) of the *Local Government Act* 1936-1979 …

> (c) any consent or approval required under any such town planning scheme, ordinance or by-law has been given in relation to the separate occupation of the proposed lots; …
>
> (5) (a) Within 40 days … after the date of receipt of the application in respect of a group titles plan for a certificate for the purposes of section 9(7), the local authority shall notify the applicant in writing of its decision to approve and the conditions imposed, if any, or refuse the application but the local authority shall not issue such a certificate until it is satisfied that any necessary works lawfully required by the conditions of approval are completed … and that all other conditions of approval lawfully require them being complied with in every respect.
>
> (b) Where the application has been approved pursuant to paragraph (a) and the applicant has complied in every respect with the requirements of or pursuant to the ordinances or by-laws, as the case may be, of the local authority, the local authority shall … issue or endorse on the plan the certificate required for the purposes of section 9(7). …"

[9] The application for approval of this subdivision was lodged by Mr Noble and Mr Gallus, who were the developers, on behalf of the then owners of lot 2. Approval was granted by the council[1] on 9 July 1987. The approval was in terms that "the application for a certificate for the purposes of section 9(7) of the *Building Units and Group Titles Act 1980*, in respect of the group titles plan wherefor a proposal plan had been submitted, be approved subject to the following conditions [including]:

> …
>
> (b) The subdivider to grant access easement rights over the accessway required by condition (g) in favour of Lot 1 on Registered Plan 202855.
>
> …
>
> (g) The subdivider is to provide a single common accessway to Lots 1 and 2 on registered Plan 202855 generally as indicated on drawing no 367/2 dated 9th June, 1987."

I will refer to these two requirements together as "the condition". The "single common accessway to Lots 1 and 2", as required by the condition, had been agreed between the respective owners of the lots. It was to be upon what was then lot 2 and was to become common property in the proposed development.

[10] Lot 1 had a battle axe shape with its narrow handle providing the access to Goldieslie Road. In 1985, the owner of lot 1 had granted a right of way over the handle in favour of lot 2. Under the agreement for this new easement, it was to replace that granted in 1985.

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1 By its delegate, the Council Registration Board.

[11] After this approval was issued, lot 2 was purchased by the developers' company, Ibenbah Pty Ltd. Pursuant to the agreement between the owners and consistently with the council's conditions, Ibenbah executed a grant of an easement dated 17 February 1988. But for reasons which need not be explored here, that instrument was never lodged for registration.

[12] In April 1988, the council issued a certificate under s 9(7), which provided that the proposed subdivision had been approved. According to s 24(5)(a), the council was not able to issue that certificate until it was satisfied that "… all other conditions of approval … have been complied with in every respect". On one view, the condition had been satisfied, because Ibenbah had executed a registrable grant. Upon another view, the condition required that grant to be registered, so that the council ought not to have issued its certificate. But either way, it is not suggested that the subdivision of lot 2, once effected, was susceptible to being reversed for the fact that such an easement had not been registered.

[13] Insofar as the condition required work to be done to provide that common accessway, it appears that the work was performed by the time of the issue of the council's certificate. The accessway was constructed upon lot 2, consistently with the unregistered easement. It became in practice the means of access to both Goldieslie Park and lot 1. The area which had been the right of way granted over lot 1 in 1985, was landscaped by Ibenbah in a way which prevented its use as a driveway.

[14] The subdivision of lot 2 was registered in June 1988. What had been lot 2 became 11 lots and the common property of a group title scheme. On registration of the plan, the grant of easement which had been executed by Ibenbah became no longer registrable, because the servient tenement became part of the common property and was no longer owned by Ibenbah. Subsequently it sold each of the individual lots.

[15] It is relevant to consider the legal position of the body corporate, as to the accessway, at this point and prior to the enactment of relevant legislation in 1990 and 1997. Prior to those enactments, there was no law by which conditions of a planning or subdivisional approval were attached to the subject land and made binding upon subsequent owners. So there was no law by which the body corporate here was bound to grant a registered easement to remedy the non-registration of the instrument which had been executed by Ibenbah. Nor did the lawful use of the land, which had become Goldieslie Park, depend upon the grant and registration of such an easement. And as already noted, the subdivision could not have been reversed for the developer's failure to comply with the condition. At this point in time, the council's decisions of 1987 and 1988 had had their effect, once the council's certificate had enabled the plaintiff's subdivision to be registered.

Subsequent legislation

[16] Next came the enactment of the *Local Government (Planning and Environment) Act* 1990 (Qld) ("the 1990 Act"). Conditions of subdivision approvals which were granted under the 1990 Act did attach to the land and were made binding on successors in title.[2]

[17] Section 8.10(3) of the 1990 Act provided that each town planning scheme which was in force immediately prior to the commencement of the 1990 Act should

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[2] s 5.1(8).

continue to have force and effect as if it were a planning scheme having force and effect under that Act.

[18] Approvals which had been granted prior to the commencement of the 1990 Act were given continuing force and effect as if they had been granted under that Act. But the conditions of those approvals were a different matter. Section 8.10(8) of the 1990 Act provided as follows:

> "(8) Each approval, consent or permission (but not any conditions attaching to the approval, consent or permission) granted by a local authority or the Governor in Council prior to the commencement of this Act, is to continue to have force and effect as if it were an approval, consent or permission, as the case may be, made pursuant to this Act (but any conditions attaching to the approval, consequent or permission are still to apply as if this Act had not commenced)."

The evident intention was that conditions of such prior approvals should not attach to the land and bind successors in title, so that their effect should be unchanged by the 1990 Act. Consequently, the 1990 Act had no effect on the body corporate's position.

[19] Next came the *Integrated Planning Act* 1997 (Qld) ("the 1997 Act"). According to the appellants' argument, it is by this statute that the condition became binding upon the body corporate and attached to its land. If that is correct, the 1997 Act had the remarkable consequence of encumbering properties with the burden of conditions, which for many years had not been the concern of those who had become the owners. The position of this body corporate, it may be inferred, was not unique in that respect. Moreover s 4.3.3(1) of the 1997 Act provides that a person must not contravene a "development approval" and s 4.3.22(1) confers a right to apply to a court for an order to remedy or restrain the commission of such an offence. Therefore, it is contended, this body corporate commenced to commit an offence immediately upon the commencement of the 1997 Act. The question is whether, upon its proper interpretation, the 1997 Act had such a substantial and belated impact.

[20] The appellants say that this is the result of s 6.1.24 read with s 6.1.23 of the 1997 Act, which it is necessary to set out in full:

> "6.1.23 Continuing effect of approvals issued before commencement
>
> (1) This section applies to -
>
> (a) conditions set by, and certificates of compliance or similarly endorsed certificates (*continuing approvals*) issued by, a local government in relation to an application mentioned in section 4.1(5) of the repealed Act and in force immediately before the commencement of this section; and
>
> (b) permits (also *continuing approvals*) issued under section 4.13(12) of the repealed Act, including modifications of the permits under

section 4.15 of the repealed Act, in force immediately before the commencement of this section; and

(c) approvals (also *continuing approvals*), including modifications of the approvals under section 4.15 of the repealed Act, in force immediately before the commencement of this section and made in relation to applications made under the following sections of the repealed Act -

- section 5.1(1)
- section 5.2(1)
- section 5.9(1)
- section 5.11(1)
- section 5.12(1); and

(d) approvals (also *continuing approvals*), by whatever name called, given under a former planning scheme but not included in paragraphs (a) to (c) in force immediately before the commencement of this section; and

(e) approvals (also continuing approvals) issued under the *Building Act 1975*, in force immediately before the commencement of this section.

(1A) However, a requirement in a local planning instrument for an action to be carried out to the satisfaction of a nominated person is not a continuing approval.

(2) Despite the repeal of the repealed Act, each continuing approval and any conditions attached to a continuing approval have effect as if the approval and the conditions were a development approval in the form of a preliminary approval or development permit, as the case may be.

(3) Subsection (2) has effect only for the period the continuing approval would have had effect if the repealed Act had not been repealed.

(4) If a continuing approval implies that a person has the right to use premises, the subject of the continuing approval, for a particular purpose (because the intended use of the premises did not also require a continuing approval) and the implied right existed, but the intended use had not started, immediately

before the commencement of this section, the intended use is to be taken to be a use in existence immediately before the commencement if -

(a) the rights (other than the implied right) under the continuing approval are exercised within the time allowed for the rights to be exercised under the repealed Act; and

(b) the intended use is started within 5 years after the rights mentioned in paragraph (a) are exercised.

6.1.24 Certain conditions attach to land

(1) If a local government has set conditions in relation to a continuing approval, the conditions attach to the land on and from the commencement of this section and are binding on successors in title.

(2) Also, if an application to amend a former planning scheme was, or the conditions attached to an amendment were, approved under the repealed Act or under section 6.1.26 and conditions in relation to either amendment were attached to the land under the repealed Act or section 6.1.26 -

(a) if the approval was given before the commencement of this section - the conditions remain attached to the land on and from the commencement of this section and are binding on successors in title; and

(b) if the approval was given under section 6.1.26 - the conditions remain attached to the land on and from the day the approval was given and are binding on successors in title.

(3) Subsections (1) and (2) apply, despite -

(a) a later amendment of the transitional planning scheme; and

(b) the later introduction or amendment of an IPA planning scheme.

(4) In this section -

former planning scheme includes any planning scheme made under the repealed Act or an Act repealed by the repealed Act."

[21] The appellants argue that the facts of this case engaged s 6.1.24(1), so that the condition became attached to the land owned by the body corporate as common property and became binding upon it. The question then is whether the 1987 approval was "a continuing approval" in the sense in which that expression is used in s 6.1.24(1).

[22] Section 6.1.1 defines, for the purposes of this part of the 1997 Act, the term "continuing approval" as meaning:

> "… a condition, certificate, permit or approval mentioned in section 6.1.23(1)."

It is common ground that the 1987 approval was not within any of subparagraphs (a), (b), (c) or (e) of s 6.1.23(1). The respondent says that it was not within (d), so that the 1987 approval was not a continuing approval and did not engage s 6.24(1).

[23] To fall within subparagraph (d), the 1987 approval had to have been given under "a former planning scheme". That term was also defined, for this part of the Act, by s 6.1.1. It was defined as follows:

> "*former planning scheme* means a planning scheme under the repealed Act … in force immediately before the commencement of this section."

Assuming for the moment that the 1987 approval was given "under a … planning scheme", was that a scheme "under the repealed Act" and "in force immediately before the commencement of this section"? The "repealed Act" was the 1990 Act. The planning scheme for Brisbane under the 1990 Act and immediately prior to the commencement of the 1997 Act was the City of Brisbane Town Plan which came into force on 13 June 1987. The 1987 Plan was a scheme under the 1990 Act, because of s 8.10(3) of the 1990 Act to which I have referred. But the planning scheme which was in force when the 1987 approval was given was an earlier one, which had come into force in 1978 and this was not a scheme under the 1990 Act. Nor was it a scheme which was in force immediately prior to the 1997 Act. At least for that reason, the 1987 approval was not within subparagraph (d). As the 1987 approval was not a continuing approval under s 6.23.1, it was not given effect by s 6.1.23(2). Nor, the primary judge held, was it an approval which would engage s 6.1.24(1).

[24] In the hearing before the primary judge, the appellants made three alternative arguments, none of which was pursued by them in this appeal. One was that the relevant approval was not that which was given in 1987, but instead was the decision made in 1988 to issue the certificate. Of course, there was a distinct decision made by the council in 1988, in that the council had to consider, amongst other things, whether the conditions of its 1987 approval had been satisfied. But the conditions of approval, most relevantly that for the easement, were imposed in 1987 and plainly it was the approval then given which was relevant. The second argument was that the expression "given under a former planning scheme", in subparagraph (d), means "given at a time when a former planning scheme was in force". Plainly also, this was incorrect. The third submission sought to draw some support from a provision of the 1987 town plan. But that provision dealt with uses and not at all with subdivisions.

The appellants' arguments

[25] I come then to the first of the arguments which are now advanced by the appellants. It seeks to employ the definition of "former planning scheme" which is within s 6.1.24(4). That defines the term differently from s 6.1.1, in that it includes also a planning scheme which was made under "an Act repealed by the repealed Act". Therefore it would include the 1978 Town Plan, because it was a scheme made under the *City of Brisbane Town Plan Modification Act* 1976 (Qld) which was repealed by the 1990 Act.

[26] This particular definition of the term "former planning scheme" is to be applied "in this section", that is to say in s 6.1.24. The appellants seek to apply it within s 6.1.24(1). The difficulty for the appellants is that the term "former planning scheme" does not appear in that subsection. It does appear in ss (2). But that deals with what used to be called rezoning applications and is of no present relevance.

[27] How then do the appellants seek to employ this definition within ss (4)? The argument proceeds in this way. Subsection (1) of s 6.1.24 should be read as if the term "continuing approval" did not appear, but that in its place were the words of subparagraph (d) of s 6.1.23(1). This is because "wherever the [defined] term appears, the text must be read as if the full definition were substituted for it", as is stated in *Bennion on Statutory Interpretation*, 5th ed,[3] citing *Thomas v Marshall*[4] and *Suffolk County Council v Mason*.[5] Therefore, the appellants argue, s 6.1.24(1) should operate as if it was in these words:

> "(1) If a local government has set conditions in relation to *an approval … given under a former planning scheme …*, the conditions attach to the land on and from the commencement of this section and are binding on successors in title."

Once that is done, the argument goes, the definition of "former planning scheme" in s 6.1.24(4) comes into play. The 1987 approval was given under a former planning scheme as defined in ss (4). Section 6.24(1) was engaged, and the conditions of that approval, relevantly the condition for the easement over the common accessway, attached to the land and bound the body corporate.

[28] This argument cannot be accepted. The definition in ss (4) of s 6.1.24 applies only where the term "former planning scheme" itself appears in that section. Otherwise (and subject to the next question to be discussed), it is the definition of the term in s 6.1.1 which is to be applied.

[29] If the approach advocated by the appellants was accepted, it would have to be consistently employed. Once that is done, the argument becomes self-defeating. Under this argument, logically the definition of "former planning scheme" in s 6.1.1 would be substituted for the words "former planning scheme" in subparagraph (d) of s 6.1.23(1), before subparagraph (d) (with that substitution) is inserted within s 6.1.24(1). The result would be that the term "former planning scheme" (again) would not appear within the operative provision (s 6.1.24(1)), so that the definition upon which the appellants would wish to rely could not assist them.

[30] Moreover, the consequences of an acceptance of this argument would be remarkable, at least because the approval itself and the conditions would not be preserved or given effect by s 6.1.23(2), yet the conditions alone would be given effect by s 6.1.24(1).

[31] The second submission now made for the appellants relies on s 32A of the *Acts Interpretation Act* 1954 (Qld) which provides that:

> "Definitions in or applicable to an Act apply except so far as the context or subject matter otherwise indicates or requires."

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3 At p 562.

4 [1953] AC 543 per Lord Morton at 556.

5 [1979] AC 705 per Lord Diplock at 713.

The argument refers to the statement by Fraser JA, in *Conde v Gilfoyle*, that s 32A reflects:

> "… an intention by the legislature that a more flexible approach be taken to the application of a statutory definition, when interpreting Queensland legislation …"[6]

[32] The appellants say that the evident purpose in the 1997 Act was to provide for the continued operation for various planning schemes "current … as at the introduction of the IPA [which] needed to continue in effect to allow time for the various local authorities to prepare and to have introduced planning schemes conforming with the requirements of the IPA".[7] That appears to be correct. But then the appellants say that a further and evident purpose was to preserve the operation of approvals in force immediately before the commencement of the 1997 Act. They say that it would have been illogical to discard then current approvals solely because they were given under a certain planning scheme. Therefore the expression "a former planning scheme" in s 6.1.23(1)(d) should be given what is said to be its ordinary meaning, which is "any previous scheme".

[33] Again, this submission cannot be accepted. There is nothing in the context or the subject matter which suggests that the definition of "former planning scheme" in s 6.1.1, which is expressed to apply for this part, should not apply to paragraph (d) of s 6.1.23(1). According to that definition, the status of a scheme as a former planning scheme depends upon its having been both a scheme under the 1990 Act and in force immediately before the 1997 Act. The appellants' argument does not identify any example of an anomaly that would be caused by applying the definition. In the present case, there would be no consequence for Goldieslie Park if the 1987 approval was not preserved as a continuing approval under s 6.1.23. That is because the approval had yielded its legal consequence, which was to permit the registration of a plan of subdivision for a group title scheme. On the other hand, were this argument accepted, the consequence would be that the conditions would have a markedly different legal effect upon property, not from the outset, but only from a decade after their imposition.

[34] It follows that neither of the arguments advanced for the appellants provides a basis for disturbing the conclusion of the primary judge that the conditions of the 1987 approval were not binding upon the body corporate.

[35] Therefore, an essential element of the appellants' pleaded case, namely that the body corporate could have been compelled to grant an easement over the common accessway, could not be established and that case had no prospect of success. The primary judge was correct to give summary judgment to the respondent.

The notice of contention

[36] It is unnecessary then to decide the arguments raised by the notice of contention. These arguments were rejected by the primary judge in an earlier judgment in which he dismissed an application for summary judgment.[8] I will comment upon one of them, because it might be considered relevant to the appellants' argument that the context and subject matter was sufficient to displace the definition of "former planning scheme".

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6 [2010] QCA 109 at [20].

7 Appellants' submissions, para 3.14.

8 *Wirkus Anor v Wilson Lawyers* [2012] QSC 150.

[37] In his earlier judgment, the primary judge rejected the respondent's submission that the 1987 approval was not a continuing approval within paragraph (d) because it was not an approval which was "in force" immediately before the 1997 Act. His Honour said that in one sense, it could be said that the approval no longer had any force, it having been acted upon to achieve the group title subdivision.[9] But in his view, the expression "in force" was intended to exclude approvals which had lapsed, been revoked or superseded.[10] He observed that some conditions of subdivision approvals have an intended operation after the subdivision is effected, so that there would be a good purpose in treating an approval to which conditions were attached as a continuing approval in this sense.[11] I would accept that where there was a subdivision approval with conditions of that ongoing nature attached to it, the approval could be said to be "in force" after the subdivision itself was effected. But in the present case, each of the conditions was necessarily one to be satisfied prior to the land being subdivided. There was no condition of a kind which required continuing compliance after the subdivision. Such a condition could not have been imposed consistently with s 24 of the *Building Units and Group Titles Act*. As already discussed, the approval granted in 1987 had made its legal impact by the time of the enactment of the 1990 Act. After the land was subdivided, it was not the source of any legal right or obligation. That could be seen from the fact that there was no potential consequence for these properties within Goldieslie Park from the non-compliance with the condition. In my respectful view, the approval was one which was not "in force" immediately before the 1997 Act. If that is correct, then had the argument as to s 32A otherwise had some substance, its flaw was in the false premise that this was an approval which in 1997 had some legal effect which it was then intended to preserve.

The unpleaded case

[38] It remains to discuss a submission which was made for the first time only in the oral submissions for the appellants. It was suggested that there was an alternative case which did not depend upon the condition having become binding upon the body corporate. It was said that the respondent's failure to discover the unsatisfied condition for an easement caused the appellants to suffer a loss, because the existence of this unsatisfied condition, together with the fact of the unregistered instrument by which it was to be granted, would have been relevant to a court determining what relief should be given to the appellants under s 180 of the *Property Law Act* 1974 (Qld). Therefore the appellants were still worse off for the respondent not having discovered the condition. It was said that this alternative argument would have at least sufficient prospects of success to warrant the setting aside of the judgment.

[39] The question is whether this new case, which was not pleaded or argued before the primary judge, ought to have the consequence of defeating a judgment which was correctly given upon the case which the appellants had pleaded. For several reasons it should not have that result. The first is that the respondent has had no means of preparing its answer to that case, and it should not be inferred that there is no answer. The second is that a response to such a case, as it was raised in oral argument in this appeal, was made more difficult by the fact that the proposed case

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9 Ibid [41].
10 Ibid [42].
11 [2012] QSC 150 at [43]-[44].

had not been reduced to a draft pleading. Thirdly, there is no explanation for why such a case was raised so late, rather than in the many editions of the appellants' statement of claim. Fourthly, the proposed case, so far as it is indicated by what was said in submissions, seems hardly compelling. The appellants did seem to have a strong case for some relief under s 180 of the *Property Law Act*, because lot 1 had become landlocked. But it is another thing to say that under s 180 they should have had an easement in the terms of that granted by Ibenbah, rather than the easement which the body corporate did agree to grant them to settle the proceedings, because it was only the former which was "reasonably necessary in the interests of effective use in any reasonable manner" of lot 1. To a judge hearing their application under s 180 in about 2005, the fact that nearly 20 years earlier the council had required an easement in terms that seem to have been the outcome of negotiations between the then owners of the respective lands, rather than an independent assessment of what was necessary, would not have been determinative.

Orders

[40] I would order that the appeal be dismissed and that the appellants pay the respondent the costs of the appeal.

[41] **McMEEKIN J**: I have read the reasons of Philip McMurdo J and I agree with those reasons and the orders proposed by his Honour.